

**Office of Chief Counsel
Internal Revenue Service**
memorandum

CC:ITA:3&1
POSTS-142487-10

UILC: 451.08-00

date: June 01, 2011

to: Peter Radjenovich
Senior Program Analyst
IRS:LB&I:PFTG

from: Andrew M. Irving
Senior Counsel, Branch 1
Office of Associate Chief Counsel
(Income Tax and Accounting) CC:ITA:1

subject: Accrual of Telephone Excise Tax Refund Income

This advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

When should a business entity that uses an accrual method of accounting report income from a telephone excise tax refund?

CONCLUSION

Based on section 5(f) of Notice 2006-50, a business entity that uses an accrual method of accounting should report income from a telephone excise tax refund on the date the return making the request is filed.

BACKGROUND

In Notice 2006-50, 2006-1 C.B. 1141, amplified by Notice 2007-11, 2007-1 C.B. 405, the Internal Revenue Service announced that it will follow the holdings of Am. Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005); OfficeMax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005); Nat'l R.R. Passenger Corp. v. United States, 431 F.3d 374 (D.C. Cir. 2005); Fortis, Inc. v. United States, 447 F.3d 190 (2d Cir. 2006); and Reese Bros. v. United States, 447 F.3d 229 (3d Cir. 2006). These cases hold that a telephonic communication for which there is a toll charge that varies

PMTA 2011-18

with elapsed transmission time and not distance (time-only service) is not taxable toll telephone service as defined in § 4252(b)(1) of the Internal Revenue Code. Accordingly, taxpayers were no longer required to pay tax under § 4251 for nontaxable service, which the notice defines as bundled service and long distance service. In addition, Notice 2006-50 notified taxpayers that they could request a refund of tax paid under § 4251 on nontaxable service that was billed to them during the period after February 28, 2003, and before August 1, 2006.

Section 5(a)(2) of Notice 2006-50 provides that taxpayers may request a credit or refund of tax on nontaxable service that was billed after February 28, 2003, and before August 1, 2006, only on their 2006 federal income tax returns. See generally *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009), vacated by 599 F.3d 652 (2010); Publication 510, Excise Taxes pp. 28-29 (Rev. April 2009).

Section 5(d)(3) of Notice 2006-50 provides that any part of the credit or refund attributable to tax payments that were deducted as an ordinary and necessary business expense (including in the determination of unrelated business taxable income) must be included in income for the taxable year in which the refund is received or accrued to the extent that the tax payments reduced the amount of federal income tax (or unrelated business income tax) imposed. The Instructions for Form 8913 provide the following:

You must report as interest income in the year received or accrued the part of your credit or refund attributable to interest, from line 15, column (e). If you deducted any telephone excise tax paid, you also must include in gross income in the year received or accrued the smaller of the amount deducted or the rest of your credit or refund, from line 15, column (d), except to the extent the deduction did not reduce federal income tax.

ANALYSIS

Section 451(a) provides the general rule that the amount of any item of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the method of accounting used in computing taxable income, such amount is to be properly accounted for as of a different period. Section 1.451-1(a) provides that, under an accrual method of accounting, income is includible in gross income when all the events have occurred that fix the right to receive such income and the amount thereof can be determined with reasonable accuracy.

Section 5(f) of Notice 2006-50 provides the following:

Estimated tax effects. Although the credit or refund allowed to a taxpayer under this notice will be requested on the taxpayer's income tax return, it is not a credit against tax for purposes of §§ 6654 and 6655. Accordingly, the taxpayer may not take the credit or refund into account in determining the amount of the required installments of estimated tax for 2006. **In determining the amount of the required installments of estimated tax for 2007, the income attributable**

to the credit or refund is taken into account on the date the income is paid or credited in the case of a cash method taxpayer and on the date the return making the request is filed in the case of an accrual method taxpayer.

(Emphasis added.) Based on section 5(f) of Notice 2006-50, a business entity that uses an accrual method of accounting should report income from a telephone excise tax refund on the date the return making the request is filed.

Please call (202) 622-4950 if you have any questions.